IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal Nos. 491 and 510 of 2003

Judgment reserved on 25.4.2007

Date of decision 15.05.2007

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(1) Dharam Pal Versus State of H.P.

(2) Vidya Sagar Versus State of H.P.

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.
The Hon'ble Mr. Justice : Sanjay Karol, Judge.

Whether approved for reporting?

For the appellants: **M/s. Tarlok Chauhan and G.R. Palsara, Advocates.**

For the respondent : **Mr. Som Dutt Vasudeva, Addl. A.G. with Mr. D.S. Nainta, Dy. A.G.**

Surjit Singh, Judge

These two appeals arise out of a common judgment of the learned Additional Sessions Judge (Fast Track Court), Shimla whereby the appellants (in both the appeals) have been convicted of an offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, hereinafter referred to as Act, and sentenced to undergo rigorous imprisonment for ten years and to pay fine of rupees one lakh each; in default of payment of fine to undergo simple imprisonment for a further

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[1] **Whether reporters of the local papers may be allowed to see the judgment?**

period of two years each. So both the appeals are being disposed of together.

2. Prosecution case, as unfolded by the evidence adduced during the course of trial, may be summed up thus. On the night intervening 29th / 30th October, 2002, around 12.15 a.m. when Khazana Ram (PW-9), Inspector (CID), Shimla was present at Boileauganj Chowk along-with Inspector Ram Lal, HC Sanjeev Kumar, HC Ashok Kumar (PW-1) and Constable Mohinder Singh (PW-4), some-one informed him that a Maruti Van bearing registration No. HP-01-1123 (registered as taxi) was coming from Ghanahatti side and in that van 'Charas' was being transported. The information was reduced into writing by PW-9 Khazana Ram and sent to the Superintendent of Police (CID) through HC Ashok Kumar (PW-1). Around 1.15 a.m. Maruti Van (taxi) bearing the aforesaid registration number came from Ghanahatti side. It was intercepted. There were two occupants, including the driver. Appellant Vidya Sagar was in driver's seat while appellant Dharam Pal was sitting beside the driver. In between the two appellants one polythene bag was found lying. Khazana Ram, Inspector informed the appellants that he had the information that 'Charas' was being carried in the van (taxi) and, therefore, it was intended to search their persons as also the van and in case they so desired, search could be arranged in the presence of a Gazetted Officer or a Magistrate. The appellants opted for search by the police officials present on the spot. Thereafter search was conducted. The bag, which was found lying on the front seat between the two appellants, was found to contain 'Charas', which weighed one kilogram 600 grams. Two samples, each weighing 25 grams, were separated. The samples and the bulk 'Charas' were made up into

three separate parcels which were then sealed with a seal that produced the impression of letter 'T'. A written report of the search and seizure was prepared and sent to the Police Station for formal registration of the case. The two appellants were taken into custody. They were informed in writing about the grounds of their arrest. The case property was deposited with the Station House Officer, who re-sealed the three parcels with his own seal. One of the two samples was sent to the Chemical Examiner, who reported that the sample contained contents of 'Charas'.

3. Case was filed in the Court of learned Sessions Judge on the completion of investigation. Appellants were charged with offence under Section 20 of the Act. They pleaded not guilty. Therefore, they were put on trial. On the conclusion of the trial, they were found guilty and convicted and sentenced as aforesaid.

4. As already noticed, the appellants have filed separate appeals. During the course of the hearing of the appeals, following points were urged on behalf of the appellants:-

(a) The entire quantity of the stuff, allegedly recovered from the appellants, was not 'Charas' and only a part of it to the extent of the percentage of resin found in the sample by the Chemical Examiner, vide report Ext. PL, could be said to be 'Charas';

(b) Evidence on record indicated that the independent witnesses were not there on the spot, but they were called to the police station where besides the appellants, three more occupants of the van, in question, were there and it was at the police station that the independent witnesses Piare Lal (PW-2) and Anil Kumar (PW-3) were made to sign the seizure memo

and other papers and the appellants were falsely implicated while other three occupants of the van, to whom the stuff belonged, were let off;

(c) Mandatory provision of proviso to sub-section (1) of Section 42 of the Act had not been complied with.

5. Elaborating the first point, learned counsel representing the appellants, submitted that the total quantity of the stuff was one kilogram and six hundred grams, but the Chemical Examiner, on analysis of the representative sample of the stuff, found that the stuff contained only 28.92 percent ‘Charas’ and if the only ‘Charas’ content of the recovered stuff was taken into account, this would be a case involving non-commercial quantity and hence punishable with lesser term of imprisonment and lesser amount of fine.

6. Appellants were tried and have been convicted of an offence punishable under Section 20 of the Act. This section makes the cultivation of cannabis plant or production, manufacture, possession, sale, purchase, transport, import inter-state, export inter-state or use of cannabis punishable. Punishment varies according to the quantity, when the offence pertains to cannabis and not the cannabis plant. The punishment is rigorous imprisonment for a term which may extend to six months or with fine if the quantity is small. Where the quantity is more than small but lesser than commercial, punishment is rigorous imprisonment which may extend to ten years and with fine which may extend to rupees one lakh. If the quantity is commercial, the punishment may extend to twenty years and to fine of rupees two lakh, but the minimum sentence in such a case is rigorous imprisonment for ten years and fine of rupees one lakh.

7. "Cannabis (hemp)" is defined vide clause (iii) of Section 2 of the Act, which is as follows:-

> "(a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;
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> (b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and
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> (c) any mixture, with or without any neutral material, or any of the above forms of cannabis or any drink prepared therefrom;"

As per its definition, as reproduced above, 'cannabis (hemp)' has three forms – one is 'charas', second is 'ganja' and the third one is any mixture of any of the first two forms of cannabis. In the present case, appellants were tried for possessing the first form of cannabis, i.e. 'Charas'. 'Charas' as per above reproduced definition means separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as 'hashish oil' or 'liquid hashish'. From the definition it is clear that it is only the resin content of the cannabis plant which is 'Charas'.

8. The Central Government in exercise of the powers under clauses (viia) and (xxiiia) of Section 2 of the Act has issued a notification fixing upper limit of 'small quantity' and the lower limit of 'commercial quantity' of various narcotic drugs and psychotropic substances. Separate limits have been fixed in respect of cannabis resin, i.e. 'Charas' or 'hashish' as defined vide sub-clause (a) of clause (iii) of Section 2 of the Act, 'ganja'

as defined in sub-clause (b) of clause (iii) of the Act and ‘mixture ‘ of different narcotic drugs and psychotropic substances as defined in sub-clause (c) of clause (iii) of Section 2 of the Act, vide Entries No. 23, 55 and 239 respectively.

9. In the instant case the stuff has been reported by the Chemical Examiner vide report Ext. PL to contain contents of ‘Charas’ and not ‘Charas’. This is because of the presence of the resin in the stuff. The percentage of the resin in the stuff is 28.92 percent. About the rest of the contents of the stuff, report of the Chemical Examiner is silent. That means the entire quantity of the recovered stuff was not ‘Charas’. It is not the case of the prosecution or in any case the appellants were not tried on the charge that they had the cannabis in the form of mixture. The charge, as already noticed, was that they had in their possession ‘Charas’, which means resin extracted from cannabis plants and the resin content in the recovered stuff was only 28.92 per cent. That means the ‘Charas’ content in the recovered stuff was 28.92 per cent. In terms of weight, the ‘Charas’ content of the recovered stuff was 462.72 grams, which is more than the small quantity but lesser than the commercial quantity as fixed vide Entry No. 23 of the aforesaid notification of the Central Government.

10. Assuming the charge against the appellants were for possessing mixture form of cannabis, in that situation also the appellants could not have been held guilty of possessing ‘commercial quantity’ of narcotic drug or psychotropic substance. Entry No. 239 of the notification of the Central Government says that in case of any mixture or preparation that of with or without a neutral material, of any of theNarcotic drugs or psychotropic substances, mentioned in the earlier Entries (No. 1 to 238),

lesser of the small quantities given against the respective narcotic drug or psychotropic substance, mentioned against Entries No. 1 to 238, forming part of the mixture, shall be taken to the 'small quantity' and the lesser of the 'commercial quantity' between the quantities given against the respective narcotic drugs or psychotropic substances mentioned at Entries No. 1 to 238 forming part of the mixture shall be taken to be the 'commercial quantity'.

11. The stuff recovered from the appellants has only one psychotropic substance, i.e. 'Charas' (resin) in it. About the rest of the stuff there is no report and, therefore, there is no escape from assumption that the same is a neutral material. Now, if it has only one psychotropic substance, i.e. 'Charas' (resin), the nature of the quantity is to be determined by reference to the limits of 'small quantity' and 'commercial quantity' prescribed for 'Charas', which means resin of cannabis plant.

12. As a result of the above discussion, we hold that the stuff, allegedly recovered from the appellants, contained 'Charas' the quantity of which was lesser than 'commercial quantity' but more than the 'small quantity' and hence the offence allegedly committed by them is punishable with rigorous imprisonment which may extend up to ten years and fine which may extend to rupees one lakh.

13. Coming on submission (b), learned counsel for the appellants stated that both the independent witnesses, namely PW-2 Piare Lal and PW-3 Anil Kumar, while in the witness box, denied the prosecution version of interception of the van and the recovery of 'Charas' from the front seat at Boileauganj Chowk and instead stated that they were called to the Police Station where five persons, including the two appellants, were already

present and that their signatures were obtained on consent memo Ext. PB, search & seizure memo Ext. PC, personal search memo Ext. PD, memo of grounds of arrest Ext. PE and inspection memo Ext. PF. The two witnesses are contradicted by their previous statements, under Section 161 of the Code of Criminal Procedure, with which they were duly confronted. In the said statements it is recorded that the van was intercepted at Boileauganj Chowk and only the two appellants were present in it and they had a plastic bag containing 'Charas' lying between them on the seat. They also stand contradicted by the contents of search and seizure memo, consent memo and other papers Ext. PB to Ext. PF, which bear their signatures. As per contents of these memos the appellants were intercepted at Boileauganj Chowk while traveling by Maruti Van (taxi) and 'Charas' was found lying between them on the front seat and there was no other occupant.

14. PW-4 Mohinder Singh, Constable and PW-9 Khazana Ram, Inspector have stated that the vehicle, i.e. Maruti Van, was intercepted at Boileauganj Chowk and only the two appellants were traveling by it and that while Vidya Sagar appellant was in driver's seat, the other appellant Dharam Pal was sitting beside him on the front seat and in between them a plastic bag containing 'Charas was kept on the seat itself. The testimony of the two witnesses is consistent and does not have any contradiction or infirmity worth noticing.

15. Defence plea that there were three other occupants of the van and that the stuff belonged to them but the police let them off on account of some extraneous consideration, is proved to be false from appellants' own conduct. Admittedly the van was being driven by Vidya Sagar, appellant. It is registered as a taxi. Now, if there were three other occupants, at-least

Vidya Sagar, who was driving the van as taxi, was supposed to be knowing who those persons were. If he was not knowing their names, because a taxi driver is not supposed to enquire about the names of the hirer of the taxi, at-least he and the other appellant were supposed to have disclosed as to where those persons boarded the taxi, where they were going and how did they look like. Thus, the defence plea is too vague to believe. Hence submission (b) is rejected being without merit.

16. As regards submission (c), it was pointed out that the van, which is a conveyance, was searched after sun set and before sun rise and this could have been done by the Police Officer concerned only after recording the reason, in accordance with the proviso to sub-section (1) of Section 42 of the Act, of his belief that the search warrant or authorization could not have been obtained without affording an opportunity for the concealment of evidence or facility for the escape of the offenders.

17. It is true that per proviso to sub-section (1) of Section 42 of the Act, where an Officer of the notified departments, who is below the rank of a Gazetted Officer, intends to enter into and search any building, conveyance or place to seize a narcotic drug or psychotropic substance or other material or documents etc., which he has reason to believe from his personal knowledge or information given by any other person and taken down in writing, to be available in such building, conveyance or place and in respect of which an offence punishable under the Act has been committed, he can do so only between sun rise and sun set and if he intends to enter into and search any such building, conveyance or place after sun set and before sun rise, he has to record the reason of his belief that a search warrant or authorization from a Gazetted Officer or a Magistrate cannot be

obtained without affording opportunity for concealment of evidence or facility for the escape of an offender, but in the present case it is Section 43 and not Section 42 of the Act which is attracted. Section 43 says that any Officer of any of the departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under the Act, has been committed and along-with such drug or substance he may also seize any animal or conveyance or article liable to confiscation under the Act. According to the Explanation appended to Section 43, expression 'public place' (for the purpose of the section) includes any public conveyance, hotel, shop or other place intended for use by, or accessible to, the public. In the present case the van, in question, was registered as taxi. Therefore, it was a public conveyance within the meaning of the Explanation.

18. A similar question was raised in **State of Yarana vs. Jarnail Singh and others,** (AIR 2004 SC 2491). In that case poppy husk packed in a number of gunny bags was being carried in a tanker during night time. The tanker was intercepted by the police and search was conducted and the bags containing poppy husk were recovered. Plea was raised that the provision of proviso to sub-section (1) of Section 42 of the Act had not been complied with inasmuch as the searching officer had not recorded the reason of belief that search warrant or authorization could not have been obtained without affording opportunity or facility to the accused to escape or to conceal the evidence. Rejecting the plea the Hon'ble Supreme Court said that since the tanker was a public conveyance and it was searched in a

public place, Section 42 of the Act was not attracted and instead the search and seizure were covered under Section 43 of the Act.

19. For the aforesaid reasons and discussion, submission © is also rejected being without merit.

20. As an upshot of the above discussion and finding with regard to submission (a) above, appeals are partly accepted. Though the conviction of the appellants for an offence under Section 20 of the Act is maintained, the sentence awarded by the trial Court on the assumption that the quantity which they possessed was commercial, is substituted by the sentence of five years rigorous imprisonment and fine of Rs.20,000/-; in default of payment of fine simple imprisonment for a further period of six months, in view of the fact that the quantity of 'Charas' recovered from them was lesser than commercial quantity. Each of the two appellants shall undergo this substituted sentence. Appeals stand disposed of accordingly.

(Surjit Singh)
Judge

May 15, 2007 (BC)

(Sanjay Karol)
Judge

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

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Judgment reserved on 25.4.2007

Date of decision 15.05.2007

Vidya Sagar ……. Appellant

Versus

State of H.P. ……Respondent

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.
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Whether approved for reporting?[2]

For the appellant: Mr. G.R. Palsara, Advocate.

For the respondent : Mr. Som Dutt Vasudeva, Addl. A.G. with Mr. D.S. Nainta, Dy. A.G.

Surjit Singh, Judge

For judgment see judgment placed on the file of Criminal Appeal No. 491 of 2003 (Dharam Pal versus State of H.P.), whereby both the appeals, i.e. Criminal Appeal Nos. 491 and 510 of 2003, have been disposed of.

(Surjit Singh)
Judge

May 15, 2007 (BC)

(Sanjay Karol)
Judge

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[2] **Whether reporters of the local papers may be allowed to see the judgment?**